No. 7488

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GALEN H. WELCH, Collector of Internal Revenue, for the Sixth Collection District of California,

Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,

Appellee.

On Appeal From the District Court of the United States, for the Southern District of California,

BRIEF FOR THE APPELLANT

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In the

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GALEN H. WELCH, Collector of Internal Revenue, for the Sixth Collection District of California,

Appellant,

vs.

THE ST. HELENS PETROLEUM COMPANY, LTD., a corporation,

Appellee.

BRIEF FOR THE APPELLANT

Opinion Below

The only previous opinion in the present case is that of the District Court of the United States for the Southern District of California (R. 37-39), which is unreported.

Jurisdiction

This appeal involves income and profits taxes of The St. Helens Petroleum Company, Ltd., a corporation, for the fiscal year ended May 31, 1921 (R. 29-30), and is taken from a judgment of the District Court in favor of the taxpayer entered November 17, 1933 (R. 24-25).

The appeal is brought to this Court by petition for appeal on behalf of the Collector of Internal Revenue filed February 16, 1934 (R. 84), pursuant to Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether a British corporation, doing business in the United States, is entitled to deduct from gross income, income taxes paid to Great Britain when such income taxes were deducted from dividends paid to its stockholders.

2. Whether the court erred in denying a motion in arrest of judgment where it appeared that the taxpayer had been allowed special assessment.

3. Whether the judgment is supported by the findings.

Statutes and Regulations Involved

The applicable provisions of the statutes and regulations involved will be found in Appendices A. and B, *infra,* pp.

Statement

The facts were stipulated. (R. 29-36, 41-64). The appellee is a corporation organized under the laws of Great Britain, having an office and place of business at Los Angeles, California, (R. 29), whose income from sources within the United Ntates during the fiscal year ended May 31, 1921, was 99.75 per centum of its total net income from all sources during that year (R. 31).

During the fiscal year ended May 31, 1921, appellee accrued and paid to the government of Great Britain an income tax amounting to £11,258-14 Sterling, which at the rate of $3.70 was the equivalent of $41,657.19 in United States currency, of which appellee deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $41,553.05, on account of said British income taxes. (R. 31).

In its income tax returns for the fiscal year ended May 31, 1921, appellee reported a tax due therein of $418,292.95, which was duly assessed and paid to appellant, then Collector of Internal Revenue for the Sixth Collection District of California. (R. 30). Upon an audit of the returns, the Commissioner of Internal Revenue determined a deficiency in appellee's tax for the year ended May 31, 1921, of $275,202.52 (R. 30), under Section 328 of the Revenue Acts of 1918 and 1921 (R. 45, 56-61), which deficiency together with interest, amounting to $116,454.01, was duly assessed (R. 30), and appellee notified of such determination and assessment by Bureau letter dated November 7, 1928 (R. 41, 43). Appellee paid such deficiency and interest to appellant, amounting to a total of $391,656.53, by applying thereon on January 22, 1929, a credit of $361,872.74 and a cash payment of $29,783.79 on March 11, 1929. (R. 30).

On or about May 3, 1930, appellee filed with the Commissioner of Internal Revenue a claim for refund of $50,000 of the tax paid for the fiscal year ended May 31, 1921, claiming that the Commissioner had made a mathematical error of $12,000 in determining the total depletion allowance for the year (R. 6), which was con-

ceded by appellant (R. 31), and allowed by the court (R. 21, 74); further claiming that the Commissioner's allowance for depletion on wells was erroneous in the amount of $11,479.90 (R. 7), which was conceded by appellant (R. 31), and allowed by the court for $6,604.41 (R. 21, 74); and further claiming that the Commissioner had failed to allow as a deduction any part of the British income tax accrued against appellee during the taxable year (R. 7). Appellee contended, and appellant denied, that appellee was entitled to such deduction, but it was agreed that if said British income taxes were deductible, the amount of such deduction for the fiscal year ended May 31, 1921, was $41,553.05. (R. 31). This amount was allowed as a deduction by the court. (R. 21, 75). No other deductions were claimed by appellee in its claim for refund (Ex. 4) or in the complaint (R. 4-11).

The Commissioner of Internal Revenue failed to take any action with respect to the claim for refund (R. 30), and this suit was commenced on November 6, 1930, for the recovery of $25,782.58 (R. 4-11).

By stipulation a jury was waived, and the case was tried by the court without the intervention of a jury. (R. 28). At the close of all the evidence, counsel for appellant moved for judgment in favor of the appellant (R. 36), and on September 21, 1933, the court, by minute entry, ordered judgment in favor of the appellee (R. 37-39). Pursuant to order of the court on motion to reopen the case for additional evidence (R. 18, 39), a stipulation of additional facts was filed November 6, 1933 (R. 41-64). Thereafter, on November 14, 1933, the appellant filed a motion in arrest of judgment

(R. 65-66), which was denied by the court (R. 67-68). The appellant filed requests for special findings of fact and conclusions of law (R. 69-71), which were denied by the court (R. 77). The findings adopted by the court (R. 19-23) were those requested by the appellee (R. 71-77).

The court held that the appellee was entitled to a deduction of $41,553.05 on account of income taxes paid to the government of Great Britain and deducted from dividends to its stockholders (R. 23), and on this basis rendered judgment for the appellee for $25,782.58 (R. 24-25). From the judgment for appellee, the appellant has appealed. (R. 84).

Specification of Errors to Be Urged

The court erred (R. 85-92):

1. In rendering judgment against the appellant and in favor of the appellee in the sum of $25,782.58, together with interest thereon and costs taxed in the sum of $20, in that the evidence introduced herein, the facts stipulated, and those facts established and found therefrom by the court and the record in this cause are insufficient to support a judgment in favor of the appellee in said amount, or in any other sum, or at all.

2. In rendering judgment for the appellee and against the appellant herein, for the reason that the evidence introduced and facts stipulated disclose that appellee is a corporation organized under the laws of Great Britain which, during the fiscal year ended May 31, 1921, accrued and paid to the government of Great Britain an income tax equivalent to $41,657.19 in United States currency

and that the appellee deducted from the dividends paid by it to its stockholders during said fiscal year an amount of at least $41,553.05 on account of said British income taxes.

3. In rendering judgment for the appellee and against the appellant herein for the reason that the facts found by the court are insufficient to support a judgment for the appellee, the court having found from the evidence introduced herein that (R. 86-88)—

I.

"* * * the plaintiff, The St. Helens Petroleum Co., Ltd., is and was at all times hereinafter mentioned, a corporation organized under the laws of Great Britain, and having its principal office and place of business at Los Angeles, California.

IX.

"That during the fiscal year ended May 31, 1921, plaintiff accrued and paid to the Government of Great Britain, an income tax in the amount of £11,258-14 Sterling, which, at the rate of $3.70 was equivalent of $41,657.19 in United States currency. The income of plaintiff from sources within the United States during the fiscal year ended May 31, 1921, was 99.75 per centum of the total net income of plaintiff from all sources during said year. The amount of the British income tax allocable to United States income was $41,553.05. Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $41,553.05, on account of said British income taxes.

X.

"That the Commissioner of Internal Revenue has allowed no deduction on account of said British

income taxes for the fiscal year ended May 31, 1921, and that no refund has been made to plaintiff of any taxes paid by it on its Federal income tax return for said fiscal year.

XI.

"The taxable net income of the plaintiff for the fiscal year ended May 31, 1921, as determined by the Commissioner of Internal Revenue, was $2,350,-425.78. The profits tax of plaintiff for said fiscal year was determined under the provisions of Section 328, Revenue Acts of 1918 and 1921, as folows:

Profits tax, Section 328 (1920 rates)	$568,803.04
Profits tax, Section 328 (1921 rates)	464,444.13
7/12 of $568,803.04	331,801.77
5/12 of $464,444.13	193,518.39
Total profits tax for fiscal year ended May 31, 1921, Section 328	$525,320.16

"The income tax of plaintiff for said fiscal year was determined as follows:

Net income—		$2,350,425.78
Less:		
Interest on United States obligations not exempt	$143,352.56	
Profits tax—	525,320.16	668,672.72
Amount taxable at 10%—		1,681,753.06
Income tax at 10%—		168,175.31"

4. In finding and concluding as a matter of law herein that any part of the amount of $41,657.19 accrued and paid by the appellee to the government of Great Britain as an income tax during the fiscal year ended May 31, 1921, and deducted by appellee from dividends paid by

it to its stockholders during said fiscal year was deductible from appellee's gross income for said year in computing the correct income tax due from it to the government of the United States.

5. In refusing to adopt appellant's proposed finding of fact number I, which reads as follows (R. 88):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a judgment in its favor in the above-entitled action,"

for the reason that the record and the evidence in this case support and require said proposed finding of fact.

6. In refusing to adopt appellant's proposed finding of fact number II, which reads as follows (R. 89):

> "The tax involved in this action was assessed under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093),"

for the reason that the record and the evidence in this case disclose that the tax involved in this action was assessed under the provisions of Section 327 and 328 of the Revenue Acts of 1918 and 1921.

7. In refusing to adopt appellant's proposed conclusions of law numbered I, II and III, which read as follows (R. 89):

> "That there was no substantial or sufficient evidence produced on behalf of the plaintiff upon which to support a Judgment in its favor in the above-entitled action.

"That this Court has no jurisdiction of the subject matter of this action, the tax involved having been assessed under the provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921 (40 Stat. 1092, 1093).

"That upon the law, the plaintiff is not entitled to recover any sum whatsoever from the defendant in the above-entitled cause."

for the reason that the evidence introduced and the facts found by the court in this action support and require the adoption of said conclusions of law and disclose that the court is without power or jurisdiction to enter a judgment for the appellee herein.

8. In concluding as a matter of law that the Commissioner of Internal Revenue erred in failing and refusing to allow to appellee a deduction on its income tax return for the fiscal year ended May 31, 1921, in the amount of $41,657.19, for income taxes accrued and paid to the government of Great Britain, for the reason that the evidence introduced and the facts found therefrom by the court disclose that the amount of $41,657.19 so paid by appellee was by it deducted from dividends paid by it to its stockholders during said fiscal year.

9. In denying appellant's motion for arrest of judgment herein for the reason that the evidence introduced herein and the facts found therefrom by the court disclose that appellee's income and profits taxes for the fiscal year ended May 31, 1921, were assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921, and the court is without power or jurisdiction to recompute the tax determined by the Commissioner of Internal Revenue.

10. In holding that it had jurisdiction or power to review the determination of the Commissioner of Internal Revenue of the appellee's net income and the amount of income and profits tax due thereon for the taxable year ending May 31, 1921, for the reason that said net income and the tax due thereon were determined by the Commissioner of Internal Revenue under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

11. In denying the appellant's motion for arrest of judgment herein for the reason that there was no substantial or sufficient evidence introduced in the case upon which to base a judgment for the appellee, and the further reason that the court had no jurisdiction or power to review the discretion of the Commissioner of Internal Revenue in determining appellee's net income and the tax due thereon for the taxable year ending May 31, 1921, the tax having been determined and assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

12. In its conclusions of law for the reason that said conclusions are not supported by the facts found by the court herein.

13. In concluding as a matter of law that the appellant had illegally collected from the appellee the sum of $25,782.58, and that the appellee is entitled to judgment against the appellant for the following reasons: (1) That the court was and is without power or jurisdiction to review the discretion of the Commissioner of Internal Revenue in determining the appellee's net income and the tax due thereon for the taxable year ending May 31,

1921, the tax having been determined and assessed under the "Special Assessment" provisions of Sections 327 and 328 of the Revenue Acts of 1918 and 1921; (2) that the tax, of which a refund is sought in this action, was determined, assessed, collected and paid as an excess profits tax within the meaning of Sections 327 and 328 of the Revenue Acts of 1918 and 1921.

14. In adopting its Finding of Fact numbered X for the reason that the same is not supported by the evidence in that the evidence and pleadings disclose that appellee's income tax for the taxable year ending May 31, 1921, was not increased by the Commissioner of Internal Revenue but that the deficiency determined arose from additional excess profits tax determined by the Commissioner.

Summary of Argument

Appellee, being a foreign corporation, was accorded special assessment under Sections 327 and 328 of the Revenue Acts of 1918 and 1921. The action of the court below in setting aside the determination of the Commissioner as to appellee's income and profits taxes constituted a review of the Commissioner's determination. Courts are without jurisdiction to review or revise the computation of income and/or profits taxes as determined by the Commissioner when special assessment has been granted.

These facts are disclosed in the findings of the court below, and the situation resulting was called to the attention of the court by motion in arrest of judgment. The question presented by the motion in arrest of judg-

ment relates to the jurisdiction of the court and is one which may be raised at any stage of the proceedings.

In passing on the merits the court below found that the deductions claimed by appellee for taxes alleged to have been paid to the Crown of Great Britain were deducted from dividends paid by appellee to its stockholders. Under the income tax laws of Great Britain approximately seventy per cent of all income taxes are collected at the source. Dividends paid to stockholders of corporations are taxed as income, and the tax thereon is deducted by the corporation from the dividends paid to stockholders, which remits the proceeds to the Crown as a tax collector for the Crown.

In the event a stockholder has other income, in making his return he is required to report as income the dividend actually received plus the amount deducted by the corporation as tax, and in turn is allowed a credit to the extent of the amount of tax already paid for him and deducted from his dividend by the corporation. In cases where the stockholder who has received a dividend was not subject to tax he may file a refund with the Inland Revenue Commissioners for the amount of the tax paid for him by the corporation and withheld from his dividend. The refund is made by the Crown direct to the stockholder and not to the corporation.

Because the stockholders and not appellee were the taxpayers of the amount sought to be claimed by appelee as a deduction on account of taxes paid to the Crown of Great Britain appellee is not entitled to the deduction.

ARGUMENT

I.

The Action of the Commissioner of Internal Revenue in Determining Appellee's Income and Profits Taxes by Special Assessment Under Sections 327 and 328 of the Revenue Acts of 1918 and 1921, Was Not Subject to Judicial Review.

The appellant contends that the action of the District Court in setting aside the Commissioner's determination of appellee's income and profits taxes and redetermining such taxes, constitutes a review of the Commissioner's determination which was unauthorized by statute and beyond the power of the court. It is also contended that in recomputing the profits taxes the court below made *new special assessments*, and thus usurped discretionary functions granted by statute to the Commissioner. It is now definitely settled that the courts are without jurisdiction to review or revise the computation of the income and/or profits taxes as made by the Commissioner when special assessments have been granted. *Heiner v. Diamond Alkali Co.*, 288 U. S. 502, 507; *Williamsport Co. v. United States*, 277 U. S. 551; *Brown's "Shamrock" Linens v. Bowers*, 48 F. (2d) 103 (C.C.A. 2d), certiorari denied, 283 U. S. 865; *Duquesne Steel Foundry Co. v. Commissioner*, 41 F. (2d) 995 (C. C. A. 3d), affirmed *per curiam*, 283 U. S. 799; *Cramer & King Co. v. Commissioner*, 41 F. (2d) 24 (C. C. A. 3d); *Joseph Joseph & Bros. Co. v. United States*, 71 F. (2d) 389 (C. C. A. 6th); *Cleveland Automobile Co. v. United States*, 70 F (2d) 365 (C. C. A. 6th); *Railway Supply Co. v. Burnet*, 51 F. (2d) 437 (App. D. C.);

Central Iron & Steel Co. v. United States, 6 Fed. Supp. 115 (C. Cls.); *W. H. Bradford & Co. v. United States*, 6 Fed. Supp. 117 (C. Cls.); *Chicago Frog & Switch Co. v. United States*, 67 (C. Cls.) 662, certiorari denied, 280 U. S. 579; *Oak Worsted Mills v. United States*, 36 F. (2d) 529 (C. Cls.), new trial denied, 38 F. (2d) 699, affirmed on another issue, 282 U. S. 409.

The most recent pronouncement by the Supreme Court as to the jurisdiction of the courts in special assessment cases will be found in the case of *Heiner v. Diamond Alkali Co.*, supra. In that case the Commissioner of Internal Revenue had granted special assessment to the taxpayer under Sections 327 and 328. Subsequently, action was brought in the Court seeking a reduction in the taxable income and the application of same rate of profits tax on net income as had been previously determined by the Commissioner of Internal Revenue under Section 328. In affirming its position in the *Williamsport Co.* case, supra, denying jurisdiction to the courts to review or alter official acts of the Commissioner under the special assessment provisions of Section 210 of Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918, the Supreme Court said (p. 507):

> "The grant of special assessment and the ascertainment of the rate or ratio of tax to be applied to the net income of the taxpayer are indissolubly connected by the terms of the statute. The exercise of the discretion in both aspects is committed to the Commissioner and to the Board of Tax Appeals upon review of his action. That discretion cannot be reviewed by the courts, nor exercised by

> them in place of the administrative officer designated by law. It is beyond the power of a court to usurp the Commissioner's function of finding that special assessment should be accorded, and equally so to substitute its discretion for his as to the factors to be used in computing the tax. The courts below were in error in adopting the rate chosen by the Commissioner and applying it to a net income other than that which he used in making his comparisons and arriving at the rate. The respondent's tax could only be computed in accordance with §301 or under §328. The former prescribes the elements to be considered, and error in the computation remains subject to judicial correction; the latter grants the taxpayer the benefit of discretionary action by the Commissioner, and precludes judicial revision or alteration of the computation of the tax."

In *Williamsport Co. v. United States,* supra, the taxpayer requested special assessment under Sections 327 and 328 of the Revenue Act of 1918, which the Commissioner refused. Suit was brought and jurisdiction challenged by demurrer. In affirming the judgment sustaining the demurrer, Mr. Justice Brandeis, speaking for a unanimous Court, said (pp. 558-559, 560, 562):

> "The task imposed on the Commissioner by §§327 and 328 was one that could only be performed by an official or a body having wide knowledge and experience with the class of problems concerned. For the requirement of a special assessment under paragraph (d) of §327 *and its computation in all cases,* are dependent on 'the average tax of representative corporations engaged in a like or similar trade or business.'

"To perform that task, power discretionary in character was necessarily conferred. Whether, as provided in paragraph (d) of §327, there are 'abnormal conditions'; whether, because of these conditions, computation under §301 would work 'exceptional hardship'; whether there would be 'gross disproportion' between the tax computed under §301 and 'that computed by reference to the representative corporations specified in section 328;' what are 'representative corporations engaged in a like or similar trade or business;' which corporations are 'as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances'—these are all questions of administrative discretion.

* * * * *

"Thus the aims which induced Congress to enact §§327 and 328, the nature of the task which it confided to the Commissioner, the methods of procedure prescribed, and the language employed to express the conditions under which the special assessment is required, *all negative the right to a review of his determination by a court.*

* * * * *

"We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities." (Italics supplied.)

In the case of *Chicago Frog & Switch Co. v. United States*, supra, the taxpayer complained that the Com-

missioner used the wrong comparatives and exacted from the plaintiff too high a proportion of tax, but it was there held that the court had no jurisdiction to review the action of the Commissioner and certiorari was denied, 280 U. S. 579.

In *Brown's "Shamrock" Linens v. Bowers,* supra, the complaint alleged that the percentage of tax to the average income of representative corporations engaged in like business and similarly circumstanced to plaintiff was 25%; that the Commissioner failed to use this ratio, but assessed plaintiff 44.8% of its net income, and counsel advanced the claim that plaintiff being a foreign corporation by the terms of Section 327 *must* be specially assessed under Section 328; that therefore it was not a matter of discretion of the Commissioner whether or not to apply Section 328, but was mandatory; that the administrative discretion determined by the *Williamsport* decision to be inapplicable to the courts referred only to Section 327; that the decision did not hold the computation under Section 328 to be administrative discretion; that the computation of tax under Section 328 was not a matter of discretion but by explicit direction.

The court ignored this claim and dismissed the complaint (41 F. (2d) 862). On appeal the Circuit Court of Appeals for the Second Circuit affirmed the dismissal (48 F. (2d) 103), and certiorari was denied (283 U. S. 865) by the Supreme Court. Thus it was effectually and finally settled that the administration of both Sections 327 and 328 is discretionary and non-reviewable. Here, as there, the taxpayer is a foreign corporation

and the District Court was in error in retaining jurisdiction when it appeared that special assessment had been accorded.

In *Oak Worsted Mills v. United States,* supra, the question of special assessment was under consideration by the Court. There it appeared that the Commissioner had computed the excess-profits tax under the provisions of Sections 327 and 328 of the Revenue Act of 1918. and because of the relief allowed under the provisions of such sections had made a refund of a substantial amount of the profits taxes paid upon the return filed by the taxpayer. Upon reconsideration of the taxpayer's right to a special assessment, the Commissioner determined that he had refunded a greater amount than the taxpayer was entitled to, and such amount was thereupon assessed against and collected from the taxpayer who then instituted suit to recover such amount upon the ground that the prior action of the Commissioner in allowing such assessment was final and that he was without authority to reassess and collect any portion of the amount refunded. The Court sustained the right of the Commissioner, within the period of limitations, to correct his errors. In a separate concurring opinion, Judge Littleton, on motion for a new trial (38 F. (2d) 699) stated (p. 704):

> "To go into the question whether the Commissioner had authority to change his determination and reassess a portion of the tax refunded under the special assessment provisions would be the same as inquiring into the correctness of such determination. The amount which the Commissioner finally determined the plaintiff owed was less than

> the tax imposed by Section 301. The entire matter was embraced within the provisions of Section 328. * * * In such a situation the court would not have jurisdiction to go into the matter. * * *"

These decisions are based on the theory that interference by a court in a special assessment case is an usurpation of the authority of the Commissioner under a statute which grants to him absolute discretion in according to a taxpayer an advantage resulting in a reduction of his tax as compared to a computation made in the regular way. While the decision in the *Diamond Alkali Co.* case was limited to a consideration of the determination of profits taxes by special assessment, the trend of the later cases applying the rule announced in that case and the *Williamsport Co.* case, have gone further and held, in effect, that courts are without jurisdiction in any case, where the Commissioner has allowed special assessment and determined the tax under the special assessment sections of the statute when the result of the court's decision, if in favor of the plaintiff, on the question presented would alter or abrogate the Commissioner's determination under the special assessment provision; or necessitate further consideration by the Commissioner for the purpose of determining whether the profits-tax rate theretofore fixed under the relief provisions would be increased or decreased, or whether the decision of the court on the question concerning the correct income had removed the abnormality upon the basis of which special assessment had been allowed.

In *Cleveland Automobile Co. v. United States*, supra, it appeared that the taxpayer corporation had been

granted special assessment of excess profits tax for the year 1920, under Sections 327 and 328 of the Revenue Act of 1918. The court held that in view of such special assessment it had no jurisdiction to pass upon a question which involved the amount of the net income of the taxpayer. On the authority of the repeated pronouncements of the Supreme Court as contained in the *Diamond Alkali Co.* and *Williamsport Co.* cases and in *United States v. Henry Prentiss & Co.*, 288 U. S. 73, the court stated (p. 368):

> "It seems to us that the logic of the *Williamsport*, *Prentiss* and *Diamond Alkali* cases leads inevitably to the conclusion that once the special discretionary power to grant relief under sections 327 and 328 is invoked and exercised, and no claim of fraud or other irregularity is asserted, neither the determination, nor the factors used in computation, nor the result itself, is open to review. It would seem to be a contradiction in terms to say that a determination to grant or deny extraordinary relief, notwithstanding the normal operation of the statute, is not open to judicial review, and yet to say that the extent of the relief granted may be reviewed. It is to say that the whole is greater than the sum of its parts, and the greater does not include the lesser. Moreover, to hold the special assessment reviewable on questions of value and income would tend to defeat the very purpose for which sections 327 and 328 were enacted. If considerations affecting net income are to remain open to review, the very basis upon which alone special assessment can be granted and made becomes a shifting one, and the assessment an idle gesture, binding the government possibly, but never the tax-

payer. The latter may with impunity speculate upon the result, and gaining nothing, lose nothing. * * * ."

This same language was adopted and followed by the court in *Joseph Joseph & Bros. Co. v. United States*, supra. Following such quotation the court said (p. 391):

> "We have quoted from the *Cleveland* case because section 210 and sections 327 and 328 are so similar in purpose and in the procedure provided as to compel the conclusion that the District Court has no more authority to review the action of the Commissioner under one section than under the other. A suit in the District Court under the Tucker Act (24 Stat. 505) contemplates a money judgment. To say that such a judgment may be awarded appellant upon the ground that the Commissioner, proceeding under section 210, wrongfully over-assessed the taxes against it through the use of incorrect data, is to substitute the court for the Commissioner. We have been cited to no statute clothing the District Court with such jurisdiction. It is not a tax assessor. See *Central Iron & Steel Co. v. U. S.*, 6 F. Supp. 115 (Court of Claims); *McDonnell v. U. S.*, 59 F. (2d) 290 (Court of Claims)."

The Court of Claims, in a number of decisions, has recognized that the discretionary power accorded the Commissioner of Internal Revenue under the special assessment statute was not subject to review and that the *Williamsport Co.* case, supra, was controlling as to the 1918 special assessment provision. Thus in *Mc-*

Donnell v. United States, 59 F. (2d) 290 (C. Cls.) the court said (p. 293):

> "The matter of the computation of the partnership's profits tax under the special relief provisions of section 210 of the Revenue Act of 1917 *was entirely within the discretion of the Commissioner.*" (Italics supplied.)

In *Freeport Texas Co. v. United States,* 58 F. (2d) 473 (C. Cls.), the court said (pp. 478-479):

> "The plaintiffs asked to have the provisions of section 210 of the Act of 1917 applied in determining the amount of their taxes for that year. The Commissioner complied with the request, so computed the taxes, and his conclusion to apply this section, and his determination of the taxes thereunder *was an exercise of his discretionary powers, and is not now subject to review.* * * * ." (Italics supplied.)

As late as March of the last year, the Court of Claims has reaffirmed its former position in holding that it was without jurisdiction to inquire into the merits of controversies presented by taxpayers where special assessment had been accorded.

Thus in *Central Iron & Steel Co. v. United States,* supra, it was held by the Court of Claims that the court was without jurisdiction to substitute its decision for that of the Commissioner when it was stated (pp. 116-117):

> "The system provided by law for a judicial review of the Commissioner's actions in tax cases contemplates that the court shall render final judg-

> ment, and, since the court is without jurisdiction to substitute its decision for that of the Commissioner as to the factors to be used in computing the tax, it cannot proceed with a case as though special assessment had not been applied, and the court is likewise without jurisdiction to decide the question presented and remand the case to the Commissioner for further exercise of his discretionary powers to determine whether or not the change in net income results in a greater or less profits tax."

And in *W. H. Bradford & Co. v. United States*, supra, where the tax liability was determined by the Commissioner under Section 328 of the Revenue Act of 1918, in connection with which determination he refused to allow a deduction from gross income for 1920 of $38,341.72, excluded by the taxpayer from its gross income in its return for 1920 and claimed as a worthless debt or a loss arising out of a shipment of coal. The court held that it was without jurisdiction to inquire into the merits of the claimed bad debt deduction which would reduce the net income as found by the Commissioner in granting special assessment of profits tax under Section 328 of the Revenue Act of 1918. The court said (pp. 118-119):

> "Inasmuch as the court is without authority to review the action of the Commissioner in determining the amount of the profits tax under section 328 or to revise, correct, or abrogate such determination, it necessarily follows that the Commissioner's action in determining the amount of plaintiff's net income is not subject to judicial review. Before the Commissioner can apply the provisions of section 328, he must determine the net income. If net income is

reduced, one of the principal factors in computing the profits tax has been destroyed and the Commissioner's determination has been altered. Any change in the income requires a new computation of the tax. This is not permitted by the statute. *Central Iron & Steel Co. v. United States* (Ct. Cl.) 6 F Supp. 115, decided this date. If the net income is altered, the same corporations used as comparatives by the Commissioner may no longer be similarly circumstanced with respect to net income. It may also be that by reason of the reduced income, because of the deduction claimed, there would be no abnormality in income, which may have been the cause that prompted the Commissioner to allow special assessment, and the taxpayer would not be entitled to any relief under the special assessment section of the statute, or that the corporations used as comparatives would no longer be comparable. Moreover, the amount of the profits tax is a deduction, credited against income under section 236 (b), Act of 1918 (40 Stat. 1080) from income in computing the income tax. If the profits tax should be rendered erroneous by reason of a change of factors upon which such tax was computed under section 328, the income tax, computed upon an income erroneously determined, by reason of the deduction of an erroneous profits tax, would also be erroneous."

In that case the facts are indistinguishable from those in the case at bar. Here the appellee claims that he was entitled to additional deductions in the way of depletion and depreciation allowances and for income tax paid to the British Crown. The allowance of such deductions by the court amounted to a review of the determination by the Commissioner under the special assessment pro-

visions of section 328 of the Revenue Acts of 1918 and 1921. It is urged that the court below erred in refusing to sustain the motion in arrest of judgment filed by appellant prior to entry of judgment.

In the Commissioner's letter of November 7, 1928, advising the appellee of a determination of a deficiency for the period herein involved (R. 45), it was stated:

> "Your profits tax liability for the fiscal years ended May 31, 1918 to May 31, 1922, inclusive, has been redetermined under the provisions of Sections 210 and 328 of the Revenue Acts of 1917, 1918 and 1921, respectively, based upon the additional information submitted."

Where the Treasury Department has promulgated a regulation which really accords greater privileges to a taxpayer than the actual wording of the statute itself would seem to justify and such administrative construction receives the implied or expressed sanction of Congress in later legislation, the taxpayer who benefits to any extent by invoking such administrative regulation should abide by the benefits received thereunder. *Lash's Products Co. v. United States*, 278 U. S. 175. The provisions of Sections 327 and 328 of the Revenue Act of 1918 were re-enacted in the Revenue Act of 1921 and the regulations promulgated by the Treasury Department (Regulations 45, Art. 913) continued without change and were reissued and applied to the Revenue Act of 1921 (Regulations 62).

Here the determination was made under Section 328 because appellee was a foreign corporation and under Section 327 (b), it was mandatory upon the Commis-

sioner to compute the tax through resort to comparatives. In *Brown's "Shamrock" Linens v. Bowers*, supra, the contention was that the Commissioner had failed and refused to use the proper ratio enjoined upon him by Section 328, and it was urged that the ratio which the Commissioner had used was not the ratio of the average tax to the average net income of representative corporations. In disposing of that contention the court said (p. 104):

> "The fact that special assessment is mandatory for a foreign corporation and permissive for a domestic one furnishes no basis for distinction when each is attacking the Commissioner's computation on the ground that he selected improper comparatives in determining the assessment which he made."

The opinion in *Williamsport Co. v. United States*, supra, gives recognition to the construction placed upon Section 210 of the Revenue Act of 1917 by the Treasury Department. In a footnote on page 558, it was stated:

> *Section 210 was liberally construed by the Treasury.* See Regulations 41, Art. 52 (T. D. 2694).

Thus it will be seen that tacit approval was given by Congress to the administrative construction and application of Section 210 by the Commissioner of Internal Revenue. Under the construction of Section 210 of the Revenue Act of 1917 by the Treasury Department, its application was identical with the application of Sections 327 and 328 of the Revenue Act of 1918. Thus, as a practical matter, the basis of comparison considered proper where either Section 210 or Section 328 was invoked, was a comparison of corporations similarly cir-

cumstanced as nearly as may be with respect to gross income, net income, profits per unit of business transacted, and capital employed, the amount and rate of war profits and excess profits and all other relevant facts and circumstances. In the application of special assessment it became necessary to secure from thousands of audited returns the statistical data of all concerns in order to determine which ones were really representative within the meaning of these statutes.

Thus, to determine whether a corporation is entitled to the relief of special assessment and, if determined affirmatively, the proper rate of profits tax, there must be available and there must be considered the returns made by all corporations in order that comparison may be made with representative corporations similarly circumstanced as nearly as may be.

The application of these sections of the statute by a court or jury would lead into a maze of collateral issues involving the minutest administrative detail. After determining the gross income, net income, profits per unit of business transacted, the capital employed, etc., with respect to the litigant taxpayer, the court or jury would then be required to proceed into the field of outside corporations not parties to the suit. In addition to determining the gross income, net income, profits per unit of business, capital employed, etc., of such other corporations, it must be further determined whether their invested capital can or can not be determined. From this outside field the court or jury must then select the most representative concerns similarly circumstanced, as nearly as may be, with respect to the things specifically men-

tioned in the statute, as well as with respect to all other relevant facts and circumstances. In determining the gross income, net income, profits per unit of business, capital employed, etc., the court or jury would be led into collateral issues as varied as all income and profits tax litigation. Since no two corporations are exactly alike, it is at once manifest that in selecting representative corporations it is necessary to have access to the facts contained in the books or tax returns of all corporations in the general class to which a litigant taxpayer belongs in order to determine which are the most nearly comparable.

After having explored this maze of administrative details and selected comparatives, the court or jury would then be called upon to fix a rate for an excess profits tax. This is the situation which the Supreme Court had clearly in mind when it affirmed the judgment of the Court of Claims in *Williamsport Co. v. United States,* supra, and denied to the courts jurisdiction to judicially review the determination of the Commissioner of Internal Revenue in special assessment cases.

Inasmuch as the court below was without power to review the action of the Commissioner in determining the amount of appellee's profits tax under Section 328, it necessarily follows that the Commissioner's action in determining the amount of appellee's net income and income tax is also not subject to judicial review, for the two acts are inter-related and dependent upon like factors, one of which is appellee's net income for the fiscal year ended May 31, 1921.

Obviously, if net income is altered, then one of the principal factors in computing the profits tax has been destroyed and the Commissioner's determination has been altered. If net income is altered, it may well be that no longer would the same corporations used as comparatives by the Commissioner by similarly circumstanced with respect to net income. It may also well be that under the reduced tax resulting from the allowance as a deduction of the item of $12,000 for oil depletion, of the item of $6,604.41 for depreciation on wells, and of the item of $41,553.05 for British income tax, that the corporations used as comparatives would no longer be comparable. Furthermore, the amount of the profits tax is a deduction (credited against income, Section 236 (b) of the Revenue Acts of 1918 and 1921) from income in computing the income tax. If the profits tax is erroneous by reason of a change of the factors upon which the computation of such tax under Section 328 was based, it must follow that the income tax, computed upon the income erroneously determined *by reason of the deduction of an erroneous profits tax*, is also erroneous.

It is urged by appellant that the computation of the income tax in this case is so inextricably bound up and related to the discretionary acts of the Commissioner which are not subject to judicial review that these activities which are really ancillary or incidental to the Commissioner's discretionary acts also may not be reviewed by the court. *Williamsport Co. v. United States*, supra.

It is respectfully submitted that the action of the Commissioner of Internal Revenue in the computation of the tax under the provisions of Section 328 of the Revenue

Acts of 1918 and 1921, precludes judicial revision or alteration of the Commissioner's determination and for that reason the decision and judgment of the court below should be reversed.

II.

A Question of General Jurisdiction May Be Raised at Any Time.

The findings of fact made by the court below disclose the facts with reference to the Commissioner's computation of the profits tax here involved under Section 328 of the Revenue Acts of 1918 and 1921. (R. 22). This finding is supported by the statement contained in the letter from the Commissioner under date of November 7, 1928, advising the appellee of the determination of the deficiency in his tax liability, wherein appellee was advised that his profits tax liability for the fiscal years ended May 31, 1918, to May 31, 1922, inclusive, had been redetermined under the provisions of Sections 210 and 328 of the Revenue Acts of 1917, 1918 and 1921, respectively. These facts, together with the provisions of Section 328 of the Revenue Acts of 1918 and 1921, deprived the court of jurisdiction to review the question in controversy. This situation was called to the attention of the court by counsel for the appellant by way of motion in arrest of judgment. (R. 65-66). The question presented by the motion in arrest of judgment relates to the jurisdiction of the court. The question of the jurisdiction may be raised at any time. *Central Iron & Steel Co. v. United States*, supra. It is axiomatic that the question of jurisdiction of the subject matter is

never waived and may be raised for the first time on appeal, and the question of general jurisdiction in Federal courts may be properly raised by a motion in arrest of judgment. *M'Eldowney v. Card*, 193 Fed. 475 (E. D. Tenn.), appeal dismissed by stipulation of counsel, 213 Fed. 1020 (C. C. A. 6th).

III.

Income Tax, Paid By a Foreign Corporation and Deducted By It From Dividends Paid By It to Its Stockholders, is a Tax Paid By the Stockholders and Not a Tax Paid By the Corporation.

The court below found (R. 21):

> "Plaintiff deducted from dividends paid by it to its stockholders during said fiscal year an amount of at least $41,553.05, on account of said British income taxes."

The appellee (taxpayer) contends that the tax is a tax on the corporation and not one on the recipient of the dividend, whereas it is the position of the appellant (Collector) that the tax is paid by the recipient of the dividends and cannot, therefore, be claimed as a deduction by the appellee corporation.

This question cannot be answered by determining who performs the physical act of paying or remitting the British tax to the Crown. That act, beyond question, was done by the appellee corporation in the instant case and not by its shareholders. In the United States it is already thoroughly recognized that physical payment is not determinative. Familiar examples are the gasoline tax, the admissions tax, and the tax on bank checks, each

of which are *paid* or borne by the purchasers of gasoline, of tickets of admission, and of the makers or issuers of the bank checks. The tax is collected and physically paid over to the Government by the gasoline dealer, the amusement association or proprietor, or the bank. Yet no one would seriously contend that either the gasoline dealer, the amusement proprietor or the bank could claim a deduction from their incomes of such taxes collected by them from their patrons, and by them as tax collectors paid over to the Government.

Therefore, in arriving at an answer to the question under consideration, it is necessary to analyze the administration of the British tax laws. Taxes in this country are, with few exceptions, assessed and collected from the taxpayer who receives the income and who bears the burden of the tax thereon. In Great Britain the principal method of collection is by deduction at the source.[1] There the tax is recovered from the payee through requiring him to include such income in his own assessment, the payer of the tax being authorized to deduct the standard rate of tax from the payment made to the ultimate proprietor. To illustrate, a limited company is required to pay the standard rate of tax on the whole of its gains, irrespective of their ultimate destination. The company may recoup itself, however, by deducting at the standard rate from such amounts as are distributed as dividends or paid out as interest on loans or deductions. It is estimated that at least 70% of the British tax is collected in this manner.[1]

[1]Taxation of Business in Great Britain, Department of Commerce, 60 Trade Promotion Series 65; The Law of Income Tax by E. M. Konstam, K.C., 4th ed., p. 4.

The Income Tax Act of 1918 of Great Britain consolidates the Income Tax Acts of 1842 and 1853, and the material provisions of all of the statutes relating to income tax up to and including the Income Tax Act of 1918. This Act contains practically all the statutory law relating strictly to income tax, except that certain matters like the rates of income tax, super tax, and the rates in respect to earned and unearned income are left to be provided by Parliament with respect to each year of assessment so that these provisions are contained in the annual Finance Acts. Income Tax by F. G. Underhay, p. 1. The Acts subsequent to the Act of 1918 relate principally to rates of taxation for the period covered by the particular Act, and, therefore, are of no value in the consideration of the question here presented. Under the Income Tax Act, 1918, the properties, profits and gains in respect of which income taxes are payable, are classified under five schedules having reference to the different sources of income, and these schedules contain rules for estimating the tax payable upon the particular classes of property. Such schedules as outlined in the Act are as follows:

Schedule A. On property in lands and buildings.
Schedule B. On occupation of lands and buildings.
Schedule C. On income from government securities.
Schedule D. On annual gains, profits, etc.
Schedule E. On income from public office, annuities and pensions.

The appellee is assessed under Schedule D. See Appendix B, *infra,* pp. 7-8.

In Great Britain individual incomes of less than £225 (formerly £160) are exempt from income tax. Subject to such exemption the British Income Tax Act of 1918 imposes a tax on all income from every source. See Income Tax Act, 1918, Sec. 1, Appendix B, *infra,* p. 1. The tax is levied and collected under five schedules which cover every kind of income. Dividends fall under Schedule D which in turn is subdivided into schedules. The Fifth Schedule of Schedule D requires an income tax statement or return "by every person entitled to profits of an uncertain value * * * or dividend, to be charged under Schedule D." The Finance Acts reimposing the income tax for subsequent years similarly charge all income with tax except such income as is therein expressly exempted.

Because "all income," including dividends, must be reported and is subject to the tax, taxpayers under the British Acts report their income, including dividends and including dividends at their full or true amount, not at the amount received in hand after tax has been *collected* therefrom by the corporation. The deduction by the corporation is not a subtraction of income from the income but is a *collection of tax* on the full or true income.

The rule relating to deduction of the tax where dividends have been paid to stockholders, which is contained in Rule 20 of General Rules applicable to Schedules A, B, C, D and E (Appendix B, *infra*, p. 8), is the same as that which was contained in Section 54 of the Act of 1842.

The procedure for the assessment and collection of taxes thereunder is outlined in the case of *Mylam v. The Market Harborough Advertiser Co., Ltd.* (1905), 21 T. L. R. 201, 5 Tax Cases 95, which involved the claim of a corporation for exemption as a "person" on the ground that its total income was less than the statutory limitations. The court, per Phillimore, J., said (p. 99):

> "Under section 54 the corporate body making an income is bound by its proper officer to make a return of its profits, and to estimate those profits before any dividend has been paid over to any shareholder or other person entitled to the benefits of the Corporation, and in due course to pay them, and all such persons are to allow out of their dividends a proportionate deduction in respect of the duty so charged. Therefore in this case the Company by their proper officer are bound in the first instance to make a return showing what their profits will be before any dividend is made, and then they are entitled in paying their dividend to deduct from that dividend as against each recipient his quota of the common income tax on the whole return of the Corporate body. That being so, there is no reason for the exemption of the Corporation, and the exception upon the exemption in this section certainly applies. *The Corporation lose nothing by paying the Income Tax because they deduct it from their shareholders.* Therefore there is no reason why they should be exempted. The shareholders may or may not be entitled, as being themselves in receipt of a smaller income than £160 a year, to exemption. In that case the procedure is well known. They must accept the dividend minus the Income Tax, and they must send a certificate that such is their dividend to the office

of the Inland Revenue, with proper declarations, and get their Income Tax returned to them." (Italics supplied.)

By virtue of the provisions of Rule 20 of the General Rules of the Income Tax Act, 1918, a company is chargeable with income tax upon the full amount of its profits without any deduction in respect of dividends paid or to be paid. On distributing a dividend, however, the company is entitled to deduct and retain tax at the standard rate for the year in which the dividend becomes due. Rule 20 provides in effect the machinery for the enforcement of the charge of tax against the recipient of a dividend. It is true that, except in the special circumstances contemplated by Section 211 (1) of the Income Tax Act, 1918, the Acts do not provide for the making of a direct assessment upon a shareholder in an English company in respect of a dividend received therefrom, but that is not to say that the shareholder is outside the scope of the charge of tax. Although not liable to direct assessment, he is within the charge, and the tax imposed by the charge is collected —and collected from the shareholder—by the process of deduction.

In the light of these considerations, when a shareholder submits to a deduction of tax from a dividend due to him, he is rightly regarded as *paying* the tax so deducted. That this conception is shared (a) by the legislature, (b) by the courts, and (c) by the Inland Revenue Department is sufficiently established by the following instances:

(a) *View of the Legislature:*

Finance Act, 1920:

Sec. 27. " * * * (1) If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax * * * ."

Finance Act, 1930:

Sec. 12. " * * * (3) * * * there shall in respect of that income be deemed to have been paid by deduction tax of such amount * * *."

These words clearly show that in the view of the Legislature a person who suffers deduction of tax thereby "pays" tax.

Income Tax Act, 1918:

Sec. 33. " * * * (1) Where an assurance company * * * claims and proves * * * that * * *, it has been charged to tax by deduction or otherwise * * * the company * * * shall be entitled to repayment of so much of the tax paid by it * * * ."

This subsection indicates that there may be a charge to tax by deduction, and that tax charged by deduction is "tax paid."

(b) *View of the Courts:*

Marion Brooke v. Commissioners of Inland Revenue (1917), 115 L. T. 715; 33 T. L. R. 54; 118 L. T. 321; 34 T. L. R. 142, 7 Tax Cases 261, per Atkin, J. (p. 269):

"But I think it is fallacious to say that the individuals who receive income from which income tax is deducted at the source are not chargeable with the tax * * * ."

His Lordship proceeds to show that—

> "If the payee has not *paid* income tax by allowing the deductions, as by the appropriate sections he is compelled to do, * * * ."

An absurd and impossible situation results.

Ibid, per Warrington, L. J. (pp. 274-275):

> "It seems to me, with all respect to the argument, it makes no difference for this purpose whether the income tax is deducted at the source, under the operation of what Lord Halsbury calls in the *Ashton Gas Company v. The Attorney-General* the somewhat difficult and complex machinery which makes the officers of the company officers of the finance department of the government for the purpose of collecting the tax, or whether the tax is directly assessed upon the person in question. *She pays the tax* * * * ." (Italics supplied.)

Williams v. Singer and Others (1918), 2 K. B. 749; (1919), 2 K. B. 108; (1920), 36 T. L. R. 661; 7 Tax Cases 387, per The Master of the Rolls (p. 402):

> "Again, it is not true to say that the Income Tax Acts look only to the legal owners, as they contain references to persons who *pay* income tax either by way of deduction or otherwise. A person who pays income tax by deduction is a taxpayer."

Hamilton v. Commissioners of Inland Revenue (1931), 2 K. B. 495; 100 L. J. K. B. 693; 145 L. T. 303; 16 Tax Cases 213, per Lawrence, L. J. (p. 234):

> "As My Lord has pointed out, the taxpayer is the shareholder and, under this machinery [i. e., Rule 20 of the General Rules of the Income Tax

Act, 1918], the company is made the collector of the shareholder's tax for the revenue."

Ibid, per Romer, L. J. (pp. 235-236):

"It has, however, frequently in recent days been pointed out by the courts, * * * that the company is one taxpayer and that each individual shareholder is another, and a separate taxpayer, on whose behalf the company deducts a tax when it pays a dividend, but on whose behalf it is not paying the tax when it pays its own tax to the Crown * * * *."

(c) *View of the Inland Revenue Department:*

In the case of a claim for relief from tax under the provisions of Section 34 of the Income Tax Act, 1918, subsection (2) of the section, Appendix B, infra, p. 6, provides that the Commissioner shall require "proof to their satisfaction * * * of the payment of tax upon the aggregate amount of income" of the claimant. It is said that many thousands of claims under this section are dealt with by the General and Special Commissioners year by year. It is also said that in the great majority of cases some part of the "aggregate amount of income" takes the form of dividends that have not borne tax otherwise than by deduction. The Commissioners with the entire concurrence of the Inland Revenue Department invariably accept proof that tax has been deducted from a dividend as satisfying the words "payment of tax."

Claims of repayment in respect of personal reliefs and allowances, of which it is said there are hundreds of thousands in every year, are dealt with in similar fashion.

Having charged the taxpayer with tax on all income, including the true or gross income, the statutes of Great Britain give stockholders of corporations reliefs or allowances for tax collected by deduction at the source. As a result the stockholder is not subjected to double taxation on the same income; that is to say, the stockholder is allowed to take credit for the tax collected from him by the corporation as collector for the Crown. Likewise, taxpayers are released from paying taxes again on interest, rents and other forms of income on which income tax has been collected by deduction at the source.

Provisions as to allowances or credits as well as to repayments or refunds are contained in the Income Tax Act, 1918. See Sections 16, 17, 27, 28, 29, Appendix B, *infra,* pp. 1-5. One of the striking evidences that the *stockholder is the taxpayer* as to the tax collected by deduction from the source of his dividends is the fact that the shareholder has the right to refund from the Crown of the tax collected from the stockholder's dividends by the corporation if, on the stockholder's whole income, the stockholder was not subject to any or as much income tax as had been collected. In other words, if the deduction of tax from the dividend amounted to an overpayment by the stockholder, as computed on the stockholder's whole taxable income, the payment is refunded, and refunded, be it observed, to the stockholder, not to the corporation. The Crown would not repay or refund to the stockholder unless under its laws the stockholder is considered as having paid the overpayment by collection from his income at

the source. The tax collected at the source is not a reduction of income but is a tax on income and is collected at the source of the income by deduction. It is said that the Inland Revenue Department makes "repayments" of tax, aggregating to millions of pounds in the year, to persons who have paid no tax otherwise than by suffering deduction from the dividends they have received; and in so doing, it acts upon the view that tax rightly suffered by deduction is tax "paid" by the person submitting to the deduction.

Snelling's Dictionary of Income Tax and Surtax Practice, 8th ed., published by Sir Isaac Pitman & Sons, Ltd., London, states (p. 151):

> "The usual circumstances in which it is necessary for a taxpayer to make a claim to repayment are—
>
> "(a) Where an individual's income is wholly taxed before receipt (e. g., an owner of property or shares) the rents or dividends from which constitute an annual income upon which the taxpayer maintains himself and his dependents.
>
> "(b) As in (a), but also where the individual is also in receipt of earned income under £160 (the exemption limit).
>
> "(c) As in (a), but where earned income in excess of £160 is also received."

It is further stated at p. 138:

> "It is, of course, necessary to prove that the tax reclaimed has in the first instance been paid to the revenue. The evidence required is usually the receipt, voucher or certificate showing the payment

or deduction of the duty in question, as will now be explained under headings appropriate to each source of income."

It is further stated at p. 156:

"A very common cause of repayment is (c), when the amount of the tax borne on taxed income is greater than the total net liability, as follows—

		Income 1929-30	Tax borne
Salary (say)		£240	
Dividends (say)		100	£20
		340	
Less Earned Income Relief	£40		
Married Allowance	225	265	Liability
Tax due at 2s. on		£75	£7 10 0

"In the above case a repayment of £12 10s. is due. Having made a return, the taxpayer automatically receives from the inspector, some weeks afterwards, a form stating that it would appear from such return it is not possible to grant full relief without repayment, and instructing him to complete the reverse side of the form and forward it (either before or immediately after the following 5th April), with all vouchers for taxed dividends, to the inspector."

Up to this point reference has been made in terms only to those cases in which a company, in paying a dividend, makes a specific deduction of tax therefrom. It is a well settled principle of the Income Tax Law of the United Kingdom, however, that a dividend paid

"free of tax" is in substance and effect a dividend of such a gross sum as after the deduction of income tax at the rate appropriate thereto, amounts to the net sum actually distributed, and that for all the purposes of the Income Tax Acts, there is no material difference between a "free of tax" dividend and a "gross, less tax" dividend of the same net amount. See *Attorney General v. Ashton Gas Co.* (1904), 2 Ch. 621; (1906) A. C. 10; and *Sir Marcus Samuel, Bart. v. Commissioners of Inland Revenue* (1918), 34 T. L. R. 552; 7 Tax Cases 277. The principles herein expressed, therefore, should be understood as applicable no less to the case of a dividend paid "free of tax" than to the case in which a dividend is shown as paid under a specific deduction of tax in accordance with the provisions of Rule 20 of the General Rules of the Income Tax Act, 1918, as modified by Section 39 (1) of the Finance Act, 1927. Moreover, by the provisions of Section 33 of the Finance Act, 1924, every warrant or cheque drawn in payment of a dividend is required to—

> "Have annexed thereto or be accompanied by a statement in writing showing—
>
> "(a) The gross amount which, after deduction of the income tax appropriate thereto, corresponds to the amount actually paid; and
>
> "(b) The rate and the amount of income tax appropriate to such gross amount; and
>
> "(c) The net amount actually paid."

This enactment applies no less to the case of a "free of tax" dividend than to the case of a dividend paid "gross, less tax."

The effect of this principle in relation to the case of a "fixed rate" dividend deserves notice, where the terms of issue of the stock carrying the dividend contain no specific reference to income tax, the net amount received by the shareholder year by year varies with variations in the rate of tax, although his income for all the purposes of the Income Tax Acts, being the gross amount of the dividend, before deduction of the tax, remains constant. Where, however, the terms of issue provide for a dividend at a fixed "free of tax" rate, the net amount actually received by the shareholder year by year remains constant whatever be the rate of tax; but his income for income tax purposes, which is taken to be the "gross" equivalent, at the prevailing rate of tax, of the "net" amount received, must necessarily vary with variations in the rate of tax.

This principle is aptly illustrated in *Snelling's Dictionary of Income Tax and Surtax Practice*, 8th ed., where it is stated (p. 101):

> "(d) *Income from Taxed Dividends, Interest, Annuities, etc.* The gross amount, i.e., the actual amount received in the year to the previous 5th April, plus the tax deducted prior to payment must be inserted in all cases. It is advisable to state in detail the sources of the various dividends, etc., and a separate sheet of paper should be used, if necessary, for this purpose, the total only being brought to this sub-section.
>
> "In the case of dividends which are termed 'Tax Free,' particular care should be taken to read the details on the dividend voucher. 'Tax Free' really means that the dividend has been declared at such

a rate that after tax has been deducted will leave the amount of the dividend. The amount to be declared is the amount shown on the voucher plus the tax applicable to it. For instance, a 'Tax Free' voucher for £5 paid out of profits which have been taxed at 4s. is really—

	£	s.	d.
Gross dividend	6	5	0
Tax borne	1	5	0
Net Dividend	£5	0	0

"The gross dividend is the amount to be declared on the return."

In the case of *Sir Marcus Samuel, Bart. v. Commissioners of Inland Revenue*, supra, the appellant was the holder of certain shares of common stock, and under the authority of a resolution of the directors duly confirmed by the stockholders at their annual meeting, the dividends upon such shares were to be paid "free of income tax." In arriving at the super-tax assessments, the Commissioners by whom such assessments were made computed the portion of the income of the appellant derived from dividends by adding to the actual sums received the amount of the income tax in respect thereto. It was contended by the appellant that when a company declares a dividend "free of tax," it in effect makes a present to the shareholders of the amount of the tax, and that such voluntary payment could not be regarded as a portion of the income of the shareholder, either for income tax or super-tax purposes, and that the real income of the appellant from the shares in question was the amount for which he could maintain an action

against the company. The court, however, rejected this contention, stating, per Sankey, J., 7 Tax Cases 277, 282-283:

"Super-tax is payable under Section 66 of the Finance (1909-10) Act, 1910, which provides that 'In addition to the income tax charged at the rate of one shilling and two-pence under this Act, there shall be charged, levied and paid for the year beginning on the sixth day of April, nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds three thousand pounds." The figures have been altered in subsequent Acts.

"It is further provided by Section 54 of the Act of 1842 that a company shall pay Income Tax on behalf of its shareholders, the marginal note of the Section reading 'Officers of Corporations to prepare statements of profits and gains to be charged, estimated on the annual profits before dividend made.' And it is provided that 'all such persons and corporations or companies shall allow out of such dividends a proportionate deduction in respect of the duty so charged."

* * * * *

"In my view this question is concluded by authority. In the case of *Attorney-General v. Ashton Gas Company* ([1904], 2 Ch. 621), it was held that, 'Where by a special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate, in calculating the rate of dividend Income Tax ought to be included."

The same interpretation was placed on the administrative procedure of the Income Tax Acts of Great Britain by the Commissioner of Inland Revenue for the fiscal year ended March 31, 1922, which contains an explanation of the principles of the British Income Tax Law. (See Appendix C, *infra,* pp. 1-5).

Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co. (1921), 1 Appeal cases 172, and *Sheldrick v. South African Breweries, Ltd.* (1923), 1 K. B. 173, are in harmony with the views herein expressed. In each of these cases corporations deducted the proper proportionate part of the income tax paid by it from dividends paid to stockholders who had shares preferred to the extent of a certain number of shillings in the pound. The right of deduction was not denied in either case, though the Court of King's Bench in the *South African Breweries* case arrived at a different conclusion from that reached by the House of Lords in the *New Zealand and Australian Land Co.* case as to what should be the amount of the deduction. This difference arose from the fact that Parliament had placed in the Finance Act, 1920, a provision not found in the Finance Act, 1916, relative to deductions of income tax paid by corporations to certain dominions. In both cases, however, the deduction of the proper amount of the tax was approved; thus showing that even where a shareholder is entitled to preferred dividends of a certain percentage, his preferred dividend has to bear its proper proportion of the income tax. The shareholder receives his preferred dividend less the tax, and he is, therefore, the one who in fact pays the tax, and not the corporation.

That rule 20 of the General Rules of the Income Tax Act, 1918, now receives the same construction by the courts of Great Britain as that which had been placed upon Section 54 of the Income Tax Act, 1842, is shown by the following statement by Warrington, L. J., in *Sheldrick v. South African Breweries, Ltd., supra,* where it was said (pp. 187-188):

> "Rule 20 is in these terms: [His Lordship read the rule and continued:] In the case of a company, that rule operates in this way. The profits or gains to be charged on the company are computed at the full amount of the payment made in dividend. When the company comes to pay the dividend to the shareholder it deducts from that dividend the proportionate amount of the income tax which it has itself paid. That means, of course, in effect, to take the case of United Kingdom income tax at 6s. in the pound, that if the company has been charged at 6s. in the pound on the whole of its profits and it divides any part of those profits amongst its shareholders, or a class of its shareholders, it deducts from the amount so paid tax at the rate of 6s. in the pound."

In *Ashton Gas Co. v. The Attorney General, supra,* a gas company was prohibited by its special Act from paying dividends to its shareholders above a fixed rate per annum. The company claimed the right to deduct the amount of the income tax from its gross profits before paying any dividend, and then to pay the dividend in full to the shareholders. The right of the company to follow this procedure was denied, and the court held that in arriving at the rate of dividend, the profits

ought to be calculated as inclusive and not exclusive of the amount payable in respect of the income tax.

In his work on Income Tax, which is "A Summary of the Law of Income Tax and Super-Tax," F. G. Underhay, in his new edition, states (p. 96):

> "It should also be borne in mind that a person is not entitled to relief in respect of income tax which he has the right to deduct or retain out of any payment to another person."

This statement is explained in a footnote which states:

> "The reason is of course that the other person, if the deduction or retention be made, actually bears the tax. *His remedy, if he is exempt from tax, is to apply for repayment of the amount of tax paid and deducted or retained.*" (Italics supplied.)

In The Law of Income Tax, by E. M. Konstam, K. C., 4th ed., it is stated (pp. 265-266):

> "The income tax on the dividends distributed forms part of the profits of the company; it is a proportionate part which the Revenue is entitled to take out of the profits. It is not a deduction before arriving at the profits; and income tax is not payable again by the shareholders on the share of the profits subsequently distributed to them.
>
> * * * * *
>
> "Accordingly, where there is a limit by way of percentage put by statute or otherwise upon the amount that may be distributed to the shareholders (or to shareholders of any particular class, such as preference shareholders), it is not lawful to pay a dividend at the fixed rate per cent. 'free of income tax.'"

Hamilton v. Commissioners of Inland Revenue (1931) 2 K.B. 495, XVI Tax Cases 213, decided by the Court of Appeal on appeal from the decision of Rowlett, J., of the King's Bench Division, involved the question of what was the taxpayer's dividend income for surtax purposes. The taxpayer held 67,500 shares of a total issue of 150,000 shares of stock in Transvaal Agency, Ltd. He was paid a dividend. The surtax was assessed on income computed by addition to the net dividend received in hand, the amount of the tax deducted therefrom by the corporation. The taxpayer contended that there should be added to the net dividend received in hand, only the amount representing his proportion of the income tax paid by the company. The Court of Appeal sustained the view that the corporation is one taxpayer, the shareholder is another, and the shareholder's income must be computed by addition to the amount received in hand as dividends, the amount of income tax at the standard rate, without any regard to what tax had been paid by the company. That is to say, the deduction made by the company is not a diminution or reduction of the stockholder's dividend but is a collection of a tax on the stockholder's true income, the tax on the stockholder being collected by deduction at the source of the income.

The decisions relied on by counsel for appellee at the trial below, as well as the more recent decisions of the courts of Great Britain relating to the position of the shareholder in a corporation, all support the conclusion reached in S. M. 3040, IV-1 Cumulative Bulletin 198, and S. M. 5363, V-1 Cumulative Bulletin 89, to the effect that an American taxpayer who has paid British income tax by deduction thereof from dividends paid to

the American taxpayer, is a taxpayer of such British income tax collected at the source, and is entitled to a credit of such British income tax against the tax payable to the United States within the provisions of the Revenue Acts of the United States. It must follow that appellee, being a British corporation doing business in the United States, is not entitled to deduct from gross income taxes which it has paid to Great Britain, where such taxes were deducted from dividends paid to appellee's stockholders, because the stockholders and not appellee paid the tax now sought to be claimed as a deduction.

It is clear from the language of the British Income Tax Act and from the actual tax practice and administration thereof by the Inland Revenue that the stockholder is treated as the taxpayer of income tax collected by deduction at the source from his dividends. This is true of every situation in which the question has arisen—charge on total income, report of income, income for super tax or surtax purposes. The court decisions of Great Britain, without exception, sustain these conclusions.

The long established practice of the Bureau of Internal Revenue has been in accord with the position here taken. The foreign tax, when deducted from dividends, has been considered as a tax paid by the stockholder, and in the determination of his individual tax liability has been allowed as a credit under Section 222 (a) of the Revenue Act of 1918, and the corresponding section of the later acts, which provide that the tax computed on individual incomes shall be credited with "the amount

of any income * * * taxes paid during the taxable year to any foreign country, upon income derived from sources therein." S. M. 3040 and S. M. 5363, *supra*. If such taxes must be allowed as a credit to the individual stockholders, obviously they should not also be allowed as deductions to the corporation. It was so held in S. M. 5363, *supra*. These rulings have been consistently followed by the officials charged with the administration of the statute, and should not be disturbed except for weighty reasons.

Brewster v. Gage, 280 U. S. 327, 336;
Fawcus Machine Co. v. United States, 282 U. S. 375.

The practice of the Commissioner has been approved by the United States Board of Tax Appeals in *Robillard v. Commissioner*, 20 B.T.A. 685. The Board held that the tax on dividends received by a citizen stockholder on stock of a British corporation, having been paid at the source by the British corporation to the Crown, was an allowable credit to the shareholder against income tax in this country. The Board held, however, that no credit would be allowed to the shareholder when the tax was paid at the source on account of a foreign corporation (of which the British corporation paying the tax was a holding company), and not on account of a shareholder. This decision was affirmed by the United States Circuit Court of Appeals for the Second Circuit, 50 F. (2d) 1083, certiorari denied, 284 U. S. 650.

In deducting tax from dividends paid, the appellee has acted as collector for the Crown of the tax imposed on the shareholder. Appellee has no more right to the de-

duction claimed than has a gasoline dealer to the right of deduction for gasoline taxes collected from its customers and paid over to the United States.

IV.
Conclusion

The decision of the court below in holding that amounts accrued and paid by the appellee to the government of Great Britain as an income tax and deducted by appellee from dividends paid by it to its stockholders during the fiscal year, was deductible from appellee's gross income for that year, and in refusing to sustain appellant's motion in arrest of judgment, was erroneous, and should be reversed.

Respectfully submitted,

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JANUARY, 1935.

APPENDIX "A"

APPENDIX "A"

Revenue Act of 1921, c. 136, 42 Stat. 227:

"SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * *

"(3) Taxes paid or accrued within the taxable year except * * * (b) so much of the income, war-profits and excess-profits taxes imposed by the authority of any foreign country or possession of the United States as is allowed as a credit under section 238, * * *.

"(b) In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the deductions allowed in subdivision (a) shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 217 under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

"SEC. 238. (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided*, That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the tax-

payer's net income (computed without deduction for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. In the case of domestic insurance companies subject to the tax imposed by section 243 or 246, the term 'net income,' as used in this subdivision means net income as defined in sections 245 and 246, respectively.

* * * * *

"SEC. 262. (a) That in the case of citizens of the United States or domestic corporations, satisfying the following conditions, gross income means only gross income from sources within the United States—

"(1) If 80 per centum or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section) for the three-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States; and

"(2) If, in the case of such corporation, 50 per centum or more of its gross income (computed without the benefit of this section) for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States; or

"(3) If, in the case of such citizen, 50 per centum or more of his gross income (computed without the benefit of this section) for such period or such part

thereof was derived from the active conduct of a trade or business within a possession of the United States either on his own account or as an employee or agent of another.

"(b) Notwithstanding the provisions of subdivision (a) there shall be included in gross income all amounts received by such citizens or corporations within the United States, whether derived from sources within or without the United States.

"(c) As used in this section the term 'possession of the United States' does not include the Virgin Islands of the United States.

"SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

* * * * *

"(b) In the case of a foreign corporation or of a corporation entitled to the benefits of section 262;

* * * * *

"SEC. 328. (a) That in the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation or of a corporation entitled to the benefits of section 262 the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

"In computing the tax under this section the Commissioner shall compare the taxpayer only with rep-

resentative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

"(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257."

Regulations 62:

"ART. 573. *Deduction allowed foreign corporations.*—Foreign corporations are allowed the same deductions from their gross income arising from sources within the United States as are allowed to domestic corporations, to the extent that such deductions are connected with such gross income. The

proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in section 217 and articles 325-328.

"ART. 611. *Credit for foreign taxes.*—This credit includes income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States but shall not exceed the same proportion of the taxes against which the credit is taken which the taxpayer's net income (computed without deduction for any income, war profits, and excess profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction). If the return is for a fiscal year beginning in 1920 and ending in 1921 the credit shall be determined entirely under the Revenue Act of 1921 instead of partly under the Revenue Act of 1918 and partly under the later statute. To secure such a credit a domestic corporation must pursue the same course as that prescribed for an individual by article 383, except that Form 1118 is to be used for claiming credit and Form 1119 for the bond, if a bond be required. For the redetermination of the tax, when a credit for such taxes has been rendered incorrect by later developments, see article 384, all of the provisions of which apply with equal force to a corporation taxpayer. For credit where taxes are paid by a foreign corporation controlled by a domestic corporation, see article 612. A claim for credit in such a case is also to be made on Form 1118. For the meaning of the terms used in section 238 of the statute see section 2 and article 382.

* * * * *

"ART. 901. *Treatment of special cases.*—In the cases specified in section 327 of the statute the tax will be specially determined under the provisions of section 328, but the tax will not ordinarily be computed under section 328 merely because the corporation's form or manner of organization, or the limitations imposed by section 326, result in a greater tax than would otherwise be payable. * * *

"ART. 911. *Computation of tax in special cases.* —In the cases specified in section 327 of the statute the tax is to be computed by comparison with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are engaged in a like or similar trade or business and similarly circumstanced. The provisions of section 328 do not permit the determination of a general average for any trade or business. In each case which comes under the provisions of section 327 the Commissioner will determine, as nearly as may be, the group or class of corporations with which the corporation should be compared and the amount which bears the same ratio to the net income of the corporation (in excess of the specific exemption of $3,000) for the taxable year as the average tax of such representative corporations bears to their average net income (in excess of the specific exemption of $3,000) for such year. The comparison will take account of similarity with respect to character of business, size and condition of plant, gross income, net income, profit per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

"ART. 913. *Determination of first installment of tax in the case of foreign corporation or a corpora-*

tion entitled to the benefits of section 262.—In the case of a foreign corporation or a corporation entitled to the benefits of section 262 the installments of the tax shall in the first instance be determined upon the basis of a war profits and excess profits tax computed by using its invested capital for the taxable year 1917, such tax for the calendar year 1921 not to exceed 20 per cent of the net income not in excess of $20,000, plus 40 per cent of the net income in excess of $20,000. For the purpose of this article the invested capital for 1917 shall be adjusted for any subsequent changes in its amount due to cash or property paid in or withdrawn or to surplus or undivided profits of prior years retained in the business and properly attributable to its business within the United States. If the tax for 1917 was determined under section 210 of the revenue Act of 1917, the constructive capital which would result in a tax equivalent to the tax determined under that section shall be used. In the case of a foreign corporation or a corporation entitled to the benefits of section 262 which was organized subsequent to the taxable year 1917, or which had no income from sources within the United States during 1917, the installments of the tax shall in the first instance be determined upon the basis of an excess profits tax equal to 20 per cent of the net income not in excess of $20,000, plus 40 per cent of the net income in excess of $20,000.

"ART. 914. *Payment of tax in special cases.*—In any case falling under the last two articles the installments shall be paid upon the basis therein provided until the Commissioner notifies the corporation of the amount of tax computed under section 328. The installments shall then be recom-

puted upon the basis of an excess profits tax of such amount, and if the amount already paid is less than the amount which would have already become due if the installments had originally been computed upon that basis, the additional amount shall be due and payable ten days after notice and demand from the collector."

Revenue Act of 1918, c. 18, 40 Stat. 1057:

"The applicable sections are practically identical with the same sections of the Revenue Act of 1921, *supra*."

APPENDIX "B"

APPENDIX "B"

The *Complete Statutes of England*, Vol. 9, pp. 426-692:

THE INCOME TAX ACT, 1918.

(8 & 9 Geo. 5, c. 40.)

An Act to Consolidate the Enactment relating to Income Tax. (8th August, 1918.)

PART I.

Charge of Income Tax.

1. Charge of income tax.—Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D, and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules.

2. Yearly assessments.—Every assessment and charge to tax shall be made for a year commencing on the sixth day of April and ending on the following fifth day of April, except where under the provisions of this Act weekly wage-earners are to be assessed and charged (half yearly).

* * * * *

PART III.

Exemption, Abatement, and Relief.

(Ss. 9-13 rep. 10 & 11 Geo. 5, c. 18, s. 64.)

* * * * *

16. Method of allowance of relief.—Except as otherwise provided, any (allowance or deduction) shall be

given either by discharge or reduction of the assessment, or by repayment of the excess which has been paid, or by all or any of those means, as the case may require.

17. No relief to be given in respect of charges on income.—A claimant shall not be entitled to (allowance or deduction) or relief in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person.

* * * * *

27. Delivery and allowance of claims for relief.—(1) Any person who claims (any allowance or deduction,) shall, within the time limited by this Act for the delivery of lists, declarations, and statements, or within such further time as the general commissioners for the division may for any special reason allow, deliver to the assessor of the parish in which he resides, a notice of his claim, together with a declaration and statement in the prescribed form, signed by him, setting forth—

(a) all the particular sources from which his income arises, and the particular amount arising from each source;

(b) all particulars of any yearly interest or other annual payments, reserved or charged thereon, whereby his income is or may be diminished; and

(c) all particulars of sums which he has charged or may be entitled to charge on account of tax against any other person, or which he has deducted, or may be entitled to deduct, out of any payment to which he is or may be liable.

(2) Any surveyor may examine every such declaration and statement and take copies of or extracts from the same.

(3) The assessor shall transmit to the commissioners the notice of claim and the declaration and statement.

If the surveyor does not within forty days after the transmission or within such further time as the commissioners on just cause may allow, make any objection to the claim, the commissioners may allow the claim.

(4) If it appears that any property or profits of the claimant are charged, or are liable to be charged, in some other division, the commissioners shall certify the allowance, in the prescribed form, to the Commissioners of Inland Revenue, who shall direct the appropriate relief to be given in that other division.

(5) If the surveyor objects in writing to such claim stating that he has reason to believe that the income of the claimant, or any other particulars in the declaration or statement of the claimant, are not truly or fully set forth in any specified particular, the claim shall be heard and determined by way of appeal by the general commissioners, in like manner as other appeals under this Act and with the like liability to penalties, and if the claim is allowed the commissioners shall grant and issue all necessary certificates accordingly.

28. Method of making and proving claims.—(1) All claims (for any allowance or deduction) shall be made and proved before the general commissioners for the division in which the claimant resides, pursuant to the powers and provisions under which tax under Schedule

D is ascertained and charged, and whether he be personally charged in that division or not.

(2) If the whole income of the claimant arises from an office or employment of profit, or from a pension or stipend under the jurisdiction of the commissioners of a department or office, the claim may be made to and allowed by those commissioners.

(3) If a claimant is not within the United Kingdom, an affidavit stating the particulars required by this Act, and taken before any person who has authority to administer, in the place where the claimant resides, an oath with regard to any matter relating to the public revenue of the United Kingdom, may be received by the respective commissioners.

(4) If satisfactory proof is given to the commissioners that a claimant is unable to attend in person, a claim on his behalf may be made by any guardian, trustee, attorney, agent or factor acting for him.

(5) Where a person is assessable on behalf of any other person, he may make a claim as aforesaid on behalf of that other person.

29. General commissioners to certify claim to special commissioners.—(1) If it is proved to the satisfaction of the general commissioners that any person whose claim for (allowance or deduction) or relief has been allowed, has paid any tax, by deduction or otherwise, the general commissioners may, in the form prescribed, certify the facts proved before them to the special commissioners.

(2) The certificate of the general commissioners shall state the particulars of the different sources of income in respect of which tax has been paid, the relief to which the claimant is entitled, the amount repayable in respect thereof, and the name and place of abode of the claimant.

(3) On receipt of the certificate, the special commissioners shall issue an order for repayment.

* * * * *

33. Relief to life insurance companies and others in respect of expenses of management.—(1) Where an assurance company carrying on life assurance business, or any companies whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case I. of Schedule D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: * * *

34. Relief in respect of certain losses.—(1) Where any person sustains a loss in any trade, profession, employment or vocation, carried on by him either solely or in partnership, or in the occupation of lands for the purpose of husbandry only, or in the occupation of woodlands in respect of which he has elected to be charged to

tax under Schedule D, he may upon giving notice in writing to the surveyor within (one year) after the year of assessment, apply to the general commissioners or to the special commissioners, for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year estimated according to this Act.

(2) The commissioners shall, on proof to their satisfaction of the amount of the loss, and of the payment of tax upon the aggregate amount of income, give a certificate authorising repayment of so much of the sum paid for tax as would represent the tax upon income equal to the amount of loss, and the certificate may extend to give any exemption, abatement, or relief depending upon total income from all sources, authorised by this Act.

Upon the receipt of the certificate the Commissioners of Inland Revenue shall cause repayment to be made in conformity therewith.

* * * * *

PART X.

Miscellaneous.

* * * *

211. Provisions as to charge and deduction of tax in any year not charged or deducted before the passing of annual Act.—(1) Where in any year of assessment any half-yearly or quarterly payments have been made on account of any interest, dividends or other annual profits or gains, previously to the passing of the Act imposing the tax for that year, and tax has not been charged thereon or deducted therefrom, or has not been charged thereon or

deducted therefrom at the rate ultimately imposed for the said year, the amount not so charged or deducted shall be charged under Schedule D in respect of those payments, as profits or gains not charged by virtue of any other Schedule, under Case VI. of Schedule D, and the agents entrusted with the payment of the interest, dividends or other annual profits or gains shall furnish to the Commissioners of Inland Revenue a list containing the names and addresses of the persons to whom payments have been made and the amount of those payments, upon a requisition made by those Commissioners in that behalf.

* * * *

237. Interpretation.—In this Act, unless the context otherwise requires:—

* * * *

"Body of persons" means any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society or persons, whether corporate or not corporate;

* * * *

Schedule D.

* * * *

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—

* * * *

Case VI.—"Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule;

and subject to and in accordance with the rules applicable to the said Cases respectively.

* * * *

Miscellaneous Rules applicable to Schedule D.

1. Tax under this Schedule shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this Schedule is hereinbefore directed to be charged.

* * * *

General Rules applicable to Schedules A, B, C, D, and E.

* * * *

20. The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.

* * * *

23.—(1) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of fifty pounds.

(2) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void.

* * * *

FIFTH SCHEDULE.

Statements, Lists, and Declarations.

* * * *

IX.—By every Person entitled to Profits of an Uncertain Value not before stated, or any Interest, Annuity, Annual Payment, Discount or Dividend, to be charged under Schedule D.

The full amount of the profits or gains arising therefrom within the preceding year.

* * * *

THE FINANCE ACT, 1920.

(10 & 11 Geo. 5, c. 18.)

An Act to grant certain duties of Customs and Inland Revenue (including Excise), to alter other duties, and to amend the Law relating to Customs and Inland Revenue (including Excise), and the National Debt, and to make further provision in connection with Finance. (4th August, 1920.)

* * * *

Part II.

Income Tax.

(S. 14 rep. 17 & 18 Geo. 5, c. 42 (S. L. R.).)

* * * *

27. Relief in respect of Dominion income tax.—(1) If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment or any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows:—

(a) If the Dominion rate of tax does not exceed one-half of the (appropriate rate of United Kingdom income) tax, the rate at which relief is to be given shall be the Dominion rate of tax:

(b) In any other case the rate at which relief is to be given shall be one-half of the (appropriate rate of United Kingdom income) tax.

* * * *

THE FINANCE ACT, 1924.

(14 & 15 Geo. 5, c. 21.)

An Act to grant certain Duties of Customs and Inland Revenue (including Excise), to alter other Duties, and to amend the Law relating to Customs and Inland Revenue (including Excise) and the National Debt, and to make further provision in connection with Finance. (1st August, 1924.)

* * * *

PART II.

Income Tax and Inhabited House Duty.

* * * *

33. Explanation of income tax deduction to be annexed to dividend warrants, etc.—(1) Every warrant or cheque or other order drawn or made, or purporting to be drawn or made, after the thirtieth day of November, nineteen hundred and twenty-four, in payment of any dividend or interest distributed by any company, being a company within the meaning of the Companies (Consolidation) Act, 1908, or a company created by letters patent or by or in pursuance of an Act of Parliament, shall have annexed thereto or be accompanied by a statement in writing showing—

(a) the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid; and

(b) the rate and the amount of income tax appropriate to such gross amount; and

(c) the net amount actually paid.

* * * *

THE FINANCE ACT, 1927.

(17 & 18 Geo. 5, c. 10.)

An Act to grant certain duties of Customs and Inland Revenue (including Excise), to alter other duties, and to amend the law relating to Customs and Inland Revenue (including Excise) and the National Debt, and to make further provision in connection with Finance. (29th July, 1927.)

* * * *

PART III.

Amendment with respect to Method of charging additional Income Tax on higher income, basis of assessment under Schedule E., etc.

* * * *

39. Provisions with respect to income tax chargeable by way of deduction.—(1) Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due, or that there may be deducted from any dividend the tax appropriate thereto, or that a proportionate deduction of the tax charged shall be allowed by any person out of any produce or value payable to him, shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due: * * *.

APPENDIX "C"

APPENDIX "C"

Sixty-Fifth Report of the Commissioners of His Majesty's Inland Revenue, For the Year ended 31st March, 1922:

Income Tax, 1921-22 (pp. 89-90):

OUTLINE OF THE TAX.

"1. * * * *In the main it is a tax on the incomes of individuals.* This fact may be illustrated by Table 67 of our last Report, which showed that out of a total actual income of £2,547,179,823 assessed to tax in 1919-20 nearly 90 per cent. was distributed among individuals resident in the United Kingdom. The remaining 10 per cent. accrued to and was retained by corporate bodies—*e.g.*, undistributed profits of limited liability companies—or accrued to person resident outside the United Kingdom. The Income Tax borne by individuals resident in the United Kingdom is a graduate tax, that is, the real effective rate of tax levied on each pound of actual total income rises gradually from a fraction of a penny in the pound until, in combination with the Super-tax, it closely approaches a maximum rate represented by the sum of the standard rate of Income Tax and the highest rate of Super-tax. Income Tax borne by individuals is thus one tax on the total income of the individual, and not a series of taxes on the separate sources of his income. It is imposed in terms of a 'standard rate' for a 'year of assessment,' which runs from the 6th April in one calendar year to the 5th April of the following year. The object of the operations of assessment and collection of the tax is to secure that every individual pays just that amount of tax which

is proper to his particular total income and circumstances, and that all non-personal income bears tax at the standard rate of tax in force for the year of assessment. * * * (Italics supplied.)

THE GENERAL SCOPE OF THE TAX.

"2. Income Tax extends, broadly speaking, to:—

(a) all income arising in the United Kingdom, by whomsoever it may be enjoyed; and

(b) all income accruing to a person residing in the United Kingdom, without regard to the place where it may arise.

* * * * *

"3. The expression 'person residing in the United Kingdom' includes, as well as individuals, companies or other bodies or associations of individuals. * * *"

Schedule D, 1921-22 (pp. 96-97):

"27. *Case I.* Broadly speaking, trade profit brought into the computation of the assessment is the difference between the gross receipts and the expenses incurred wholly and exclusively for the purposes of the business. Among such expenses may be mentioned debts which are proved to be bad, doubtful debts to the extent that they are estimated to be bad, and any Excess Profits Duty or Corporation Profits Tax which has been paid in respect of the business. The net amount upon which tax has been paid under Schedule A in respect of lands and buildings owned by the trader and occupied for the purposes of his business is also deducted in arriving at the profit, in order to avoid a double charge of tax on that part of the total profit of the business. In the case of mills,

factories, and other similar premises, an additional deduction is allowed as explained in the following paragraph. The Acts prohibit deductions in respect of capital charges, lost capital, losses unconnected with the business, and private and domestic expenses. They also prohibit, under the system of collection at the source (*see* para. 41 *et seq.*), the deduction of certain charges which would normally be regarded as commercial expenses. Such charges include any annual interest on borrowed money, annuity, or other annual payment payable out of the profit, and any royalty in respect of a patent. The total profit brought into the computation of the assessment thus includes these charges, but as the trader is entitled on paying the interest, royalty, etc., to deduct therefrom income tax at the standard rate of tax appropriate to the period to which the interest, royalty, etc., relates, he recovers in this manner the tax relating to that part of the total profits paid away to other persons."

Schedule E. 1921-22 (pp. 103-105):

COLLECTION OF THE TAX

"41. *The peculiar distinction of the British Income Tax is collection at the source. Broadly speaking, whenever it is possible to do so, tax is obtained by deducting it before the income reaches the person to whom it belongs.* Wherever possible, the formal assessment is laid on each source of income by itself, and on persons who are debtors in respect of income belonging to other persons. Power is given to the payers of income to deduct the appropriate tax from the payments made to the ultimate proprietors of that income. For instance, instead of tax being collected directly from the various persons who may be

interested in the rents arising from lands or buildings which are let, it is normally assessed on and recovered from the occupier of the property, who deducts it from the rent paid to his landlord. He, in his turn, if the property is encumbered with a mortgage or subject to a ground rent, may deduct the appropriate tax from the payments of those charges. Similarly, a limited liability company is assessed to tax at the standard rate on the whole of its profits, without reference to the ultimate destination of those profits. On paying interest to its debenture holders or dividends to its shareholders, the company is entitled to deduct and retain the amount of tax appropriate to the interest paid or dividend distributed, and the investor thus receives his interest or dividend subject to this deduction of tax." (Italics supplied.)

"42. The principal classes of income on which tax is collected by deduction at the source are the following—

* * * * *

"*Schedule D.* Dividends, debenture and other interest paid by limited liability companies; interest and dividends payable by Dominion and Foreign companies through agents in the United Kingdom; coupons for dividends payable abroad which are realised through a banker or coupon dealer in the United Kingdom; patent royalties; annual interest and annuities payable under contracts.

* * * * *

It is estimated that in 1921-22 approximately 67 per cent of the net yield of the tax was collected at the source.

"43. Whether the tax charged in respect of any income brought into assessment is collected by de-

duction at the source or not thus depends upon the *ultimate proprietorship* of the income assessed. So far as the person charged is not the ultimate proprietor, the tax is collected by deduction at the source; so far as he is, the tax is collected directly. The chief classes of income in respect of which the tax is collected directly are the profits from trade of individuals, whether sole or partnership traders, *the like profits of limited liability companies so far as they are not distributed to shareholders, debenture holders, etc.;* profits from the occupation of land; income from professions and most employments; income from Dominion and Foreign securities and possessions not paid through agents in the United Kingdom; income from certain interest, discounts, etc. (Italics supplied.)

"44. The income of limited liability companies is charged in the assessments at the full standard rate of tax. With certain exceptions, income on which tax is collected at the source is similarly charged and tax is deducted from the recipient of the income at the full standard rate. * * *."